Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12-45 OF 1999-III(I)
IAN CHIN J
1 AUGUST 2000

Limitation *— Contract — Breach of fiduciary duty and good faith arising from implied term of contract of employment — Claim for recovery of compensation from employee for wrongful withdrawal of share script belonging to plaintiff's client — Whether statute-barred — Sarawak Limitation Ordinance items 19, 94 & 97*

The defendant was employed by the plaintiff as a trainee remisier. Because of a shortage of remisiers, the defendant was allowed by the plaintiff to trade and to withdraw script. The defendant had withdrawn the scripts belonging to one of the plaintiff's client, William Wong, without his consent. William Wong was then compensated by the plaintiff. The plaintiff sought to recover the compensation from the defendant. The pleading gave no indication as to whether the claim was based on tort or on contract. However, this was elaborated on in the submissions to refer to a breach of fiduciary duty and good faith arising from an implied term of the contract of employment. Though none of these were pleaded, there was no objection from the defendant. The lower court gave judgment for the plaintiff for the sum claimed. The lower court accepted the plaintiff's argument which was proceeded on the basis of an implied term and held that such a claim fell within the Limitation Ordinance, item 94 or item 97, providing for a six-year limitation. The lower court also went on to hold that the limitation period would only begin to run after the discovery of the fraud. The lower court did not agree with the contention of the defendant that the action was governed by item 19 providing for a two-year limitation for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not therein specially provided for. The action was commenced in June 1997 and the alleged breach of duty took place in May 1994 which means that the action was statute-barred if the defendant's contention can be upheld. The defendant argued that even if the misdeed was a breach of contractual duty, it was nevertheless a tortious act qualifying it to be described either as a malfeasance or misfeasance or non-feasance within the meaning of item 19. The defendant also contended that since the plaintiff had alleged fraud, they bore the higher burden of proof.

Held, dismissing the appeal:

(1) A claim for damages for fraud or deceit would not come under item 19. Since the defendant chose to argue that the plaintiff's case was based on fraud, item 19 was not applicable (see pp 406E, 407E).

(2) The plaintiff's claim was clearly ex contractu and there were specific provisions that pertained for suit by principal against an agent for misconduct since the defendant could be considered as agent of the plaintiff when dealing with William Wong or for breach of the implied term of fidelity and good faith which there was no demurrer when such a claim was asserted. There was a near complete disregard of the plaintiff for the rules of pleadings (see p 407F–G).

(3) Where a claim is dependent on establishing conversion, it must be proved beyond a reasonable doubt. Since it was the plaintiff's case that the defendant had converted certain shares belonging to William Wong, proof must be beyond a reasonable doubt. The evidence was so overwhelming that the defendant took the shares and that he had for that purpose signed the forms that it cannot but be said that it had been established beyond a reasonable doubt. There was plenty of justification in the lower court's disbelief of the denial of the defendant in signing those forms. That the defendant had taken the scripts was established beyond a reasonable doubt (see pp 411C–D, 415F).

(4) The evidence justify the decision of the lower court's finding that William Wong was to be believed when he testified that he did not consent to the defendant taking his scripts though the defendant had asserted otherwise. There was no consent at all from William Wong which decision of the lower court cannot at all be faulted (see p 415H–I).

[Bahasa Malaysia summary

Defendan telah diambil bekerja oleh plaintif sebagai seorang remiser pelatih. Disebabkan kekurangan remiser, defendan dibenarkan oleh plaintif untuk berniaga dalam dan menarik balik surat saham sementara. Defendan telah menarik balik surat-surat saham sementara kepunyaan salah seorang klien plaintif, William Wong, tanpa izinnya. William Wong kemudiannya dibayar pampasan oleh plaintif. Plaintif cuba mendapat kembali pampasan daripada defendan. Pliding tidak memberi petunjuk mengenai sama ada tuntutan tersebut adalah berkenaan tort atau kontrak. Walau bagaimanapun, ini telah dihuraikan dalam penghujahan sebagai merujuk kepada kemungkiran kewajipan fidusiary dan keikhlasan yang berbangkit daripada suatu terma tersirat kontrak penggajian. Walaupun tidak satu daripada ini telah diplidkan, defendan tidak membuat apa-apa bantahan. Mahkamah rendah telah memberi penghakiman kepada plaintif untuk jumlah yang dituntut. Mahkamah rendah menerima hujah plaintif yang diteruskan atas dasar suatu terma tersirat dan memutuskan bahawa tuntutan sedemikian jatuh dalam lingkungan Ordinan Had Masa, perkara 94 atau perkara 97, yang memperuntukkan had masa enam tahun. Mahkamah rendah juga selanjutnya memutuskan bahawa tempoh had masa hanya akan

bermula selepas fraud diketahui. Mahkamah rendah tidak bersetuju dengan hujah defendan bahawa tindakan tersebut dikuasai oleh perkara 19 yang memperuntukkan had masa dua tahun untuk pampasan ke atas apa-apa salah laku bebas daripada kontrak dan yang tidak diperuntukkan secara khas dalamnya. Tindakan tersebut telah dimulakan pada Jun 1997 dan kemungkiran kewajipan yang dikatakan berlaku pada bulan Mei 1994 yang bermakna bahawa tindakan tersebut adalah dihalang oleh had masa sekiranya hujah defendan dibenarkan. Defendan berhujah bahawa jikalau pun perbuatan salah tersebut merupakan suatu kemungkiran kewajipan kontraktual, namun begitu ia masih suatu perbuatan berunsurkan tort yang layak disifatkan sebagai salah laku dalam lingkungan maksud perkara 19. Defendan juga berhujah bahawa oleh kerana plaintif telah mendakwa wujudnya fraud, mereka memikul beban membukti yang lebih tinggi.

Diputuskan, menolak rayuan tersebut:

(1) Suatu tuntutan ganti rugi untuk fraud atau penipuan tidak terangkum dalam perkara 19. Oleh kerana defendan telah memilih untuk berhujah bahawa kes plaintif adalah berasaskan fraud, perkara 19 tidak terpakai (lihat ms 406E, 407E).

(2) Tuntutan plaintif jelasnya ex contractu dan terdapat peruntukan-peruntukan khusus yang berkaitan dengan guaman oleh prinsipal terhadap seorang ejen untuk salah laku memandangkan defendan boleh dianggap sebagai ejen plaintif ketika berurusan dengan William Wong atau untuk kemungkiran terma kesetiaan yang tersirat dan keikhlasan yang mana tiadanya bantahan apabila tuntutan sedemikian dibuat. Plaintif hampir tidak menghormati keseluruhan kaedah-kaedah mengenai pliding (lihat ms 407F–G).

(3) Apabila suatu tuntutan bergantung pada bukti konversi (conversion), ia mestilah dibuktikan melampaui keraguan munasabah. Oleh kerana adalah merupakan kes plaintif bahawa defendan telah melakukan konversi saham-saham kepunyaan William Wong, bukti mestilah pada darjat melampaui keraguan munasabah. Keterangan adalah begitu jelas bahawa defendan telah mengambil saham-saham tersebut dan beliau telah menandatangani borang-borang itu untuk tujuan tersebut hinggakan tidak boleh disangkalkan bahawa kes telah dibuktikan melampaui keraguan munasabah. Terdapat banyak justifikasi untuk ketidakpercayaan mahkamah rendah ke atas penyangkalan defendan dalam menandatangani borang-borang tersebut. Hakikat bahawa defendan telah mengambil surat-surat saham sementara tersebut telah dibuktikan melampaui keraguan munasabah (lihat ms 411C-D, 415F).

(4) Keterangan menjustifikasikan keputusan mahkamah rendah bahawa William Wong haruslah dipercayai apabila beliau

memberi keterangan bahawa ia tidak memberi persetujuan kepada defendan mengambil surat-surat saham sementaranya walaupun defendan telah berhujah sebaliknya. Tiada apa-apa kebenaran langsung daripada William Wong dan keputusan mahkamah rendah ini tidak boleh dipersalahkan sama sekali (lihat ms 415H–I).] A B

Notes

For cases on limitation in contract cases, see 9 *Mallal's Digest* (4th Ed 1999 Reissue) paras 2035–2039. C

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Kiu (Personal representative of the estate of Chan Weng Sun, deceased) v Yim Yut Kiu [1997] 2 MLJ 45 (refd) D

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Eastern Shipping Co Ltd v Quah Beng Kee [1924] AC 177 (refd)

Green v Nixon (1857) 23 Beav 530 (refd)

Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors [1995] 4 MLJ 328 (refd) E

Joliffe v Baker (1883) 11 QBD 255 (refd)

Kitchen v Royal Air Forces Assoc & Ors [1958] 2 All ER 241 (refd)

Narayanan Chettyar v Official Assignee, Rangoon AIR 1941 PC 93 (refd)

PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 (refd) F

Rejfek v McElroy (1965) 112 CLR 517 (refd)

Robb v Green [1895] 2 QB 315 (refd)

Saminathan v Pappa [1981] 1 MLJ 121 (refd)

Seet Soon Guan v PP [1955] MLJ 223 (refd)

Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101 (refd) G

Legislation referred to

Contracts Act 1950 ss 17, 17(e), 18, 19 H

Limitation Ordinance (Sarawak Cap 49)

Natonal Land Code s 340

Penal Code ss 206, 207, 208, 209, 210, 240, 243, 247, 251, 253, 261, 262, 263, 264, 265, 266, 415, 421, 422, 423, 424, 463, 464, 465, 471, 474, 477 I

Arthur Lee (*Arthur Lee Lin & Co*) for the defendant/appellant.

Tony Ling (*HC Lee & Partners*) for the plaintiff/respondent.

Ian Chin J:

Introduction

Sarawak Securities Sdn Bhd, the plaintiff in the court below and the respondent here, had sued Eric Chan Thiam Soon, the defendant/appellant, for a sum of RM78,873.50. But the cause of action was a matter of much argument not surprisingly when the relevant parts of the statement of claim are worded this way:

Amended Statement of Claim

1 The plaintiff ... is a member of ... (KLSE).

2 The defendant is an employee of the plaintiff ...

3 Sometime ... 26 May 1994 whilst in the course of his employment with the plaintiff, the defendant executed Scrip Withdrawal Forms pertaining to the account of William Wong Tiing Ho ... and withdrew ... from the said [account the following shares]: [Particulars given].

4 The aforesaid withdrawal was made without the knowledge and consent of the said William Wong.

5 Sometime ... 23 December 1996 the plaintiff received a letter ... from ... William Wong stating that the scripts of the said shares were withdrawn from his account without his knowledge and consent by the defendant ... [and] ... demanded for compensation/restitution from the plaintiff.

6 ... the plaintiff wrote ... to the defendant [for an explanation] ... but the defendant failed and/or omitted to respond.

7 The plaintiff then, at William Wong's request for certain shares unlawfully withdrawn by the defendant to be paid in cash, paid to the said William Wong RM29,1100 on 24 February 1997. The sum represents the market value of those shares to be paid in cash as at 13 February 1997. The particulars of which are as follows: [Particulars of shares as stated].

8 The plaintiff then transferred the remaining shares unlawfully withdrawn by the defendant to the said William Wong's CDS account on the 20 March 1997.

9 [The other shares unlawfully withdrawn were replaced by the plaintiff from their stock account or through purchase costing RM46,983.50.

10 ... 11 ...

The lower court after a trial gave judgment for the plaintiff for the sum claim but most of the submissions of counsel were not dealt with in the one and a half page grounds of decision. Now, the cause of action was a matter of much argument because it was relevant to the issue of whether the action was time-barred under the Limitation Ordinance (Sarawak Cap 49).

Whether action time-barred

Mr Tony Ling, learned counsel for the plaintiff, had at the lower court contended that the defendant by withdrawing the shares and while being an employee of the plaintiff '*has breached his duty of fidelity and good faith towards the plaintiff.*' It will be noticed that the pleading not only did not refer to

such a breach, it also did not refer to any contract of service as containing such a duty. It is also not pleaded that such a term is to be implied. However, a written terms of employment was admitted without objection as evidence and the plaintiff's argument proceeded on the basis of an implied term and this was accepted by the lower court which held that such a claim falls within the Limitation Ordinance, item 94 providing for a six-year limitation and which is for 'compensation for breach of a contract in writing' or item 97 providing also for a six-year limitation and which is for suit 'for which no period of limitation is provided elsewhere in this Schedule'. The lower court also went on to hold that the limitation period would only begin to run after the discovery of the fraud in the following words, viz:

> Although fraud is not pleaded the act of the defendant in executing script withdrawals by using script withdraw forms without the knowledge or consent of PW1 is not only malfeasance but would amount to fraud and in such case, the period of limitation would only start to run after the discovery of the fraud.

The lower court did not agree with the contention of the defendant that the action is governed by item 19 providing for a two-year limitation and the relevant part of which reads:

> For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for

The action was commenced sometime in June 1997 and the alleged breach of duty took place in May 1994 which means that the action is statute-barred if the defendant's contention can be upheld. Mr Arthur Lee, learned counsel for the defendant, did not take issue regarding the finding of the lower court that there is an implied term in the contract of employment that the defendant should act with fidelity and good faith towards the plaintiff even though it is not pleaded. But he argued that even if the misdeed was a breach of the contractual duty it is nevertheless a tortious act qualifying it to be described either as a malfeasance or misfeasance or nonfeasance within the meaning of the said item 19. For that contention to succeed it must satisfy the proviso in item 19 that the act complained of is malfeasance or misfeasance or nonfeasance and also that the act must be '*independent of contract and not herein specially provided for*'. It must also be borne in mind what is said concerning the matter of the construction of the various items of the Schedule by Sanjiva Row on the *Limitation Act 1963* (7th Ed) Vol 1, p 768:

> 2 Applicability of the articles — In determining the particular article of the act, applicable to a case much depends upon the nature of the plaintiff's claim. It is the frame of the suit that governs the question as to which article of the act applies to it. If the plaintiff is entitled to so frame his suit as to make a certain article giving a favourable period of limitation applicable, it is not a valid objection to say that he could have framed it otherwise so as to make a less favourable article applicable.
>
> Unless a suit falls clearly within the ambit of the article sought to be applied that article should not be invoked. The rule of interpretation to be applied is that if frame of suit naturally falls within the four corners of a

A particular article, the construction is not to be strained for the purpose of throwing it into a category of suits to which a more favourable period of limitation is given by some other article of the Schedule. There is always one article applicable to a case, and the court has to find it, though more than one may seem to be applicable, so as to confine each article to one category of suits. If there be two articles which may cover the case, the one more general and the other more particular or specific, the latter article prima facie applies. It is a well known rule of construction that where there is a specific article applicable to a suit or application, the residuary article should not be applied unless the suit or application cannot be brought within the clear wording of the specific article. But if the two articles limiting the period for bringing the suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable considerations, be preferred. The period of limitation prescribed in this Schedule lapses not on the expiry of the definite number of years prescribed therein but on the expiry of the number of years together with the time which is excluded from the calculations.

D So, the plaintiff may waive a tort and sue within the longer period of limitation for actions *ex contractu*. How, then, is the claim of the plaintiff framed? The relevant parts of the statement of claim had already been reproduced, as above. The allegation against the defendant is that he unlawfully withdrew shares from the account of one of the clients of the plaintiff resulting in the plaintiff having to compensate the client. The E pleading as it stands give indication as to whether the claim is based on tort or on contract. However, this was elaborated on in the submissions in the lower court to refer to a breach of fiduciary duty and good faith arising from an implied term of the contract of employment. Though none of these were pleaded there was no objection from learned counsel for the defendant; not F even before this court. The case of *Robb v Green* [1895] 2 QB 315 was referred to both here and below and it concerns an employee defendant who had copied the list of the plaintiff employer's customers for the purpose of using it after he leaves to set up a similar business. The court there held '*that it was an implied term of the contract of service that the defendant would observe good faith towards his master during the existence of the confidential relation* G *between them, and that the defendant's conduct was a breach of that contract in respect of which the plaintiff was entitled to damages and an injunction*'. Thus, that case is authority for saying that a breach of the duty as alleged by the plaintiff constitutes a breach of the contract of employment upon which the plaintiff can sue for damages. The contention relating to this issue calls for two questions to be answered: (i) whether the act complained of is a H malfeasance or non-feasance or misfeasance; and (ii) whether the claim is '*independent of contract and not herein specially provided for*'.

Mr Tony Ling had argued that the descriptions of malfeasance or non-feasance or misfeasance relate to the performance of duties by public authorities only and are not used to describe the performance of duties by I an individual or private corporation. I do not find merit in that contention. While it is true that when one talks of bad performance or non-performance by a local authority one uses the terms misfeasance and non-feasance (see

Clerk & Lindsell on Torts (14th Ed) para 864, p 481). However, in Sanjiva Row on the *Limitation Act 1963* (7th Ed) Vol 2, p 609, 'misfeasance' was used to describe the acts of directors of a company. Furthermore, Osborn's *Concise Law Dictionary* (6th Ed), when defining those terms place no limitation as that urged by Mr Tony Ling except for the term 'non-feasance'. Take, for example, malfeasance is defined simply as: 'The doing of an unlawful act; eg a trespass.' and misfeasance as: '... the improper performance of a lawful act; eg where there is negligence or trespass. A misfeasor is a person who is guilty of a misfeasance.' Even in the case of non-feasance, the learned author did not limit its application but only gave as an example its application to a failure to keep in repair the highway by a local authority. Actions held to come under art 36 of the Indian Limitation Act 1908, which is similar to item 19, include a claim for compensation for mental distress and loss of dignity caused by wrongful deprivation of an office and a claim by a landlord against the tenant for damages for unauthorized (ie illegal) use of a water tank (the tenant being held to be a trespasser) and a claim by a local authority against its ex-chairman for money embezzled by him during his tenure of office (see Rustomji on *The Law of Limitation and Adverse Possession* (5th Ed) Vol 1, pp 658–659). Therefore, I am of the view that those terms can be applied to the acts or omission of an individual or company as well as to a public authority.

But a claim for damages for fraud or deceit would not come under art 36 (Rustomji, p 660). In this regard the defendant's learned counsel had made the following submission:

> The respondent in alleging a misdeed, of fraud against the defendant in paras 3.2 and 4 of the Statement of Claim ... bears a higher burden of proof.

If it is true as contended by learned counsel for the defendant that the plaintiff's claim is based on fraud, then item 19 would have no application. It will be recalled that the plaintiff's counsel had maintained that this is a claim for a breach of an implied duty of fidelity and good faith. What really is the plaintiff's claim? This calls for a consideration of the duties of the defendant as an employee of the plaintiff. The defendant was employed as a 'Trainee Remisier (Designate)' for a period of six months from 1 July 1993 and at a salary of RM1,500. The employment was terminable by either side by one month's notice. Because of a shortage of remisiers, the defendant was allowed by the plaintiff to trade and to withdraw script. It was found by the lower court that the defendant was the person who prepared the necessary documents with the scripts belonging to William Wong and that it was done without the consent of William Wong. William Wong was then compensated by the plaintiff. It is this compensation that the plaintiff seeks to recover from the defendant. The loss occasioned by the act of the defendant was to William Wong for which William Wong had a cause of action for conversion. William Wong also had a cause of action against the plaintiff: (i) as the employer of the defendant for vicarious liability on account of the conversion by the defendant of the scripts; or (ii) for detinue when the plaintiff failed to deliver to the defendant the scripts when demanded by the defendant. As between the plaintiff and the

defendant, the plaintiff would have a right to be indemnified by the defendant which right could be the matter of a term implied in the contract of employment or as a matter of law or equity (*Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177 (PC)). Therefore, the plaintiff's right is the nature of a right to be indemnified by the defendant in respect of the repayment in cash and kind of the scripts which the defendant had converted while in the employment of the plaintiff. The plaintiff also had a right as a bailee of the scripts to sue the defendant for conversion since both the bailor and the bailee has the right to sue a stranger for a wrongful act (*Clerk & Lindsell on Torts* (14th Ed) para 1123). It must be remembered that the breach of the duty of fidelity or good faith did not result in the plaintiff suffering any damage but only in William Wong. Therefore, an action based on the contract of employment and the implied term would not be appropriate. The plaintiff can only come into the picture after the defendant had demanded for the return of the scripts or for compensation in cash upon which comes into existence the liability of the plaintiff as bailee or vicariously as employer. If the plaintiff had made compensation, it could then sue for an indemnity under an implied right of indemnity under the contract of employment. The period of limitation would then be item 64 and it is three years from the time the plaintiff was actually damnified, that is when the plaintiff compensated William Wong. Therefore, the plaintiff's action should have been for an indemnity which right could either be implied under the contract of employment or could arise under the law or equity. The plaintiff did not suffer any loss until they chose to compensate William Wong. But since, as mentioned earlier, the defendant's counsel chose to argue that the plaintiff's case is based on fraud, Item 19 does not cover a claim for damages for fraud.

This brings me to the next question of whether the plaintiff's claim '*is independent of contract and not herein specially provided for*'. Given what I have said, the plaintiff's claim is clearly ex contractu and there are specific provisions that pertain, as in item 71 for suit by principal against an agent for misconduct since the defendant could be considered an agent of the plaintiff when dealing with William Wong or item 64 which I mentioned earlier or Item 94 for breach of the implied term of fidelity and good faith which, as mentioned earlier, there was no demur when such a claim was asserted. There was a near complete disregard of the plaintiff for the rules of pleadings.

Standard of proof

Mr Arthur Lee had contended that since the plaintiff had alleged fraud they bore 'the higher burden of proof'. In *Ang Hiok Seng @ Ang Yeok Seng v Yim Kiu (Personal representative of the estate of Chan Weng Sun, deceased) v Yim Yut Kiu* [1997] 2 MLJ 45 (FC) there was an allegation that an option to purchase was void as it was obtained by fraudulent means, that is, by misrepresenting that the document would not affect his right under a lessee and that the document was to test the value of the property. That defence was raised in answer to a claim for specific performance of the option to purchase. The Federal Court there held:

(3) Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a balance of probability is applicable. In this case, since the allegation of fraud was purely civil in nature and not based or connected with a criminal offence, the civil standard was applicable.

The Federal Court then went on to give examples of civil fraud by reference to ss 17 and 18 of the Contracts Act 1950 ('the Act'). This means even where fraud is alleged provided it is 'purely civil', to quote the term used by the Federal Court, the burden of proof on balance of probabilities still apply. Sections 17 and 18 of the Act define certain acts as 'fraud' and 'misrepresentation' which are committed for the purpose of deceiving or inducing someone to enter into a contract and which contracts are then voidable under s 19. This means acts which are fraudulent and which induced the entering of or which deceived someone into entering an agreement attracts the burden of proof on balance of probabilities. These acts would, under s 17(e) of the Act, include those declared 'fraudulent' by the Penal Code since they would fall within the following definition of s 17(e) — '*any such act or omissions as the law specially declares to be fraudulent.*' Offences under the Penal Code involving the element of fraud are these:

206 Fraudulent removal or concealment of property to prevent its seizure as a forfeiture or in execution of a decree.

207 Fraudulent claim to property to prevent its seizure as a forfeiture or in execution of a decree.

208 Fraudulently suffering a decree for a sum not due.

209 Dishonestly making a false claim before a court.

210 Fraudulently obtaining a decree for a sum not due.

240 Delivery of coin, possessed with the knowledge that it is counterfeit.

243 Possession of coin by a person who knew it to be counterfeit when he became possessed thereof.

247 Fraudulently or dishonestly diminishing the weight or altering the composition of coin.

251 Delivery of coin, possessed with the knowledge that it is altered.

253 Possession of coin by a person who knew it to be altered when he became possessed thereof.

261 Effacing any writing from a substance bearing a government stamp, or removing from a document a stamp used for it, with intent to cause loss to government.

262 Using a government stamp known to have been before used.

263 Erasure of mark denoting that stamp has been used.

264 Fraudulent use of false instrument for weighing.

265 Fraudulent use of false weight or measure.

266 Being in possession of false weights or measures.

421 Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.

422 Dishonestly or fraudulently preventing from being made available for his creditors a debt or demand due to the offender.

423 Dishonest or fraudulent execution of deed of transfer containing a false statement of consideration.

424 Dishonest or fraudulent removal or concealment of consideration.

463 Forgery.

464 Making a false document.

471 Using as genuine a forged document.

474 Having possession of a valuable security or will known to be forged, with intent to use it as genuine.

477 Fraudulent cancellation, destruction, etc of a will.

This means where it is sought to avoid a contract by a party who had been deceived or induced to enter into by the other party committing any of the offences which I have just set out, proof of the same need only be on a balance of probabilities. Since 'civil fraud' comprised cases of 'criminal fraud' under the Penal Code (by virtue of s 17(e) of the Contracts Act), this distinction of 'civil fraud' and 'criminal fraud' cannot hold and it is, in my humble opinion, an attempt at distinguishing the undistinguishable since 'fraud' by its incorporation of the offences under the Penal Code where fraud is an element has the same meaning whether in criminal or civil cases and they are 'criminal fraud'. 'Fraud' has been described as — 'dishonesty of some sort' (*PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136); 'a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled' (*Green v Nixon* (1857) 23 Beav 530 at p 535); 'conduct which having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other' (*Kitchen v Royal Air Forces Assoc & Ors* [1958] 2 All ER 241; 'to cheat a man of a known existing right' (*Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101); 'acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person or persons' (*Seet Soon Guan v PP* [1955] MLJ 223 in relation to s 465 of the Penal Code)); 'base conduct and moral turpitude' (*Joliffe v Baker* (1883) 11 QBD 255). All the descriptions will be befitting a crime involving dishonesty or fraud as set out in the said sections of the Penal Code. It is difficult to find purely 'civil fraud' since fraud involves dishonesty which forms the basis of many criminal offences. Take the allegation in *Ang Hiok Seng* that someone had misrepresented the contents of a document and thus induced the signing of it resulting in the signatory losing his right under a lease. Such conduct is 'cheating' within the meaning of s 415 of the Penal Code. The end result of *Ang Hiok Seng* would be that in civil proceedings taken out for the avoidance of a contract alleged to have been induced or deceived by fraud,

facts which amount to the commission of a crime, have only to be established on a balance of probabilities except for facts that amount to: (i) conspiracy to defraud; (ii) misappropriation of money; and (iii) criminal breach of trust. The legislature should step in and pass a law to say that in all civil proceedings the burden of proof in respect of all matters is that of on a balance of probabilities. This would put an end to the irreconcilable decisions of the highest court instead of leaving the matter to successive courts to try and extricate itself from the insoluble problem and which leads to more problems and more uncertainty in the law. I am all for a single standard of proof on a balance of probabilities in civil proceedings and I said so in *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328 where I have referred to the various conflicting decisions of our courts.

Does *Ang Hiok Seng* which is concerned with the setting aside of a contract applies to a case claiming for damages for an alleged unlawful act amounting to a fraud and an offence within the meaning of the Penal Code? One of the issues in *Ang Hiok Seng* is the burden of proof of fraud in civil proceedings. Therefore, the decision, in my view, covers all civil proceedings and not only those confined to the avoidance of a contract.

The Court of Appeal in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 (CA) also dealt with the question of proof of fraud in civil proceedings. It held that the standard of proof to be applied in civil forgery suits is the balance of probabilities. That case involves a plaintiff suing for her name to be restored in the registry concerned as being the owner of a parcel of property. Allegation was made that her purported signature on a transfer document was forged and thus bringing into play s 340 of the National Land Code which postpone indefeasibility on account of fraud or misrepresentation. The Court of Appeal there held that under the common law proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities except where statute otherwise provides (citing *Rejfek v McElroy* (1965) 112 CLR 517) and except for allegation of fraud which has to be proved beyond a reasonable doubt (citing the observation of Lord Atkin in *Narayanan Chettyar v Official Assignee, Rangoon* AIR 1941 PC 93 at p 95) and *Saminathan v Pappa* [1981] 1 MLJ 121). *Saminathan v Pappa* also concerned s 340 of the National Land Code and with an allegation that Pappa had misrepresented to the Collector of Land Revenue that Saminathan desired the transfer of the disputed land to her. This was regarded as fraud and the Privy Council concluded that such case required proof beyond reasonable doubt. *Boonsom Boonyanit* can only be justified on the basis that 'forgery' is not 'fraud' and therefore proof on a balance of probabilities is only required of the forgery. But that, in my view, is untenable because forgery is just one way of committing fraud given the descriptions of fraud I have earlier referred to. The word 'fraud' and its cognate term 'fraudulent' features in the offence of forgery or fraudulent use of a forged document (see ss 463 and 471 of the Penal Code). Therefore, to take forgery or the fraudulent use of a forged document out of the category of 'fraud' where proof beyond a reasonable doubt is required, cannot be justified on the ground that forgery or the fraudulent use of a forged document is not fraud. That decision can only be

justified by, relying on *Ang Hiok Seng*, and by concluding that the forgery or the fraudulent use of a forged document is a civil fraud under s 17(e) of the Act since it is a fraud declared under a written law, that is the Penal Code. *Boonsom Boonyanit* serves to highlight the difficulty and undesirable manner in which our courts try to resolve conflicting decisions. Returning to the poser regarding a claim for damages for an unlawful act amounting to fraud and to an offence under the Penal Code, the answer would depend, following the binding decision of *Ang Hiok Seng*, on whether the allegation amounts to a 'civil fraud' within any of those s 17(e) Penal Code offences which are to be regarded as 'civil fraud', or a 'criminal fraud' like conspiracy to defraud or misappropriation of money or criminal breach of trust. Let us assume that the claim is for conversion. This would be akin to criminal breach of trust within the meaning of s 405 of the Penal Code. Applying *Ang Hiok Seng*, it would mean that this is 'criminal fraud' requiring proof beyond a reasonable doubt since it involves misappropriation or criminal breach of trust. This means where a claim is dependent on establishing conversion it must be proved beyond a reasonable doubt. The present case is such since the breach of fidelity or good faith can only be established if it is established that the scripts had been converted by the defendant. In fact, it is the plaintiff's case that the defendant had converted certain shares belonging to William Wong. That being so, proof must be beyond a reasonable doubt. This takes me to a consideration of the contentions relating to whether the evidence established the case beyond a reasonable doubt.

Whether the act of conversion had been proved

The defendant's counsel complained that the lower court had hardly consider the case of the defendant. For this purpose I reproduce in full the grounds of decision of the lower court, viz:

> Grounds of Decision
>
> The plaintiff's claim against the defendant is for RM78,873.50 being the alleged sums they have compensated one, Mr William Wong (PW1), their client, pertaining to whose account with the plaintiff the defendant as trainee remiser and in the course of the employment with the plaintiff has withdrawn shares without the knowledge and consent of the said Mr William Wong.
>
> The summons was filed in June 1997. The alleged wrong doing occurred in May 1994. The defence alleges that this claim falls under item 19 of the Schedule to the Limitation and thus the applicable period of limitation is two years and the claim is therefore out of time.
>
> The learned counsel for the plaintiff contends that time only starts to run after the discovery of the fraud on the part of the plaintiff.
>
> In my view, the claim is not couched in fraud per se and there is no specific pleading based on fraud nor has any particulars of fraud been pleaded.
>
> The claim, to my mind, is based on a breach of implied duty in a written contract of service (exh P7) and the applicable item in the schedule is item 94 or even if that is applicable then it should fall under item 97 for which the period of limitation is six years and the claim is therefore not out of time.

Although fraud is not pleaded the act of the defendant in executing script withdrawals by using script withdraw forms without the knowledge or consent of PW1 is not only malfeasance but would amount to fraud and in such case, the period of limitation would only start to run after the discovery of the fraud.

I accept PW1 is a witness of truth and I accept his evidence that he did not authorise the defendant to make script withdrawals of the scripts in exhs P4A and B.

The defendant's evidence is inconsistent in that on the one hand he contends DW1 came to an arrangement with him regarding the script withdrawal and on the other hand that he did not sign the script withdrawal from exhibit P4A and B. I find the defendant's evidence is untrue.

On the evidence, it can only mean that it was the defendant who executed the script withdrawal form and no one else and that as trainee remiser it was the practice that he was allowed by the plaintiff to do so on behalf of the clients if there was such authorization or consent of the client.

It is clear that there was no such authorization or consent by his client. The defendant has therefore breached his duty to the plaintiff as a result of which the plaintiff has suffered loss in having to pay to PW1 in cash and in buying bill of shares. I find it as a fact that the plaintiff has paid to PW1 the shares for which the defendant has withdrawn without the authorization of PW1.

I give judgment therefore to the plaintiff in the sum claimed ie RM78,873.50 with interests thereon at 8% pa from judgment to payment agreed.

Costs to the plaintiff to be taxed unless agreed.

I have already set out the plaintiff's claim which was supplemented by particulars which I will refer to later. As for the defence, I will set out the relevant paras, viz:

3 The defendant denies the several allegations in para 3 of the amended statement of claim and puts the plaintiff to strict proof of the several allegations then. The defendant avers that at the material time he was a trainee remiser and could not under the Securities Industries Act, deal with the plaintiff's clients or transact any of their trading activities and in fact the said transactions were those of the plaintiff's licensed remiser, Fauzee Kassim. The defendant avers that the said withdrawal of script vide the script withdrawal form was approved by the plaintiff's servant and agent and credit control department and was subsequently dealt with in accordance to the instructions of the said William Wong.

4 The defendant denies the several allegation in para 3 (on p 2) of the amended statement of claim and puts the plaintiff to strict proof of the several allegations therein. The defendant avers that the said William Wong is fully aware of the aforesaid withdrawal and in fact also authorized the same.

7 The defendant has no knowledge of the several allegation in paras 6, 7, 8 and 9 of the statement of claim and puts the plaintiff to strict proof thereof. The defendant avers that the said William Wong have in truth and in fact received the proceeds of the scripts listed in para 6 of the amended statement of claim notwithstanding the plaintiff alleged claim that the said William Wong demanded compensation.

A 8 Further or in the alternative, the defendant avers that even if the defendant did withdraw the script of the said shares from the said William Wong's account without his knowledge (which is not admitted), the said William Wong have thereafter consented thereto and had received from the person who had control and custody of the said shares, full restitution.

B

The plaintiff's evidence

William testified that after his trading account was passed to the defendant he had given him instructions to buy and sell shares. It was in August 1996 C that he decided to liquidate his position as he needed money for his son's education. He called the defendant but he was directed to a Lionel Ling who sold the shares as directed by him. A few days later Lionel Ling called him to say that he had short-sell two lots of Tan Chong shares as he was not the owner of those shares. He told Lionel that it could not be. He got hold of the defendant who told him that he had the shares and that he will pay D him back the two lots. He then gave instruction to Lionel Ling to trace his other shares and was told by Lionel Ling that all his shares had been withdrawn by the defendant. He confronted the defendant. The evidence of William Wong relating to this part of the case reads:

E So I was worried and that weekend I came back. I met him on Sunday morning and he was with his wife at a coffee shop in third mile. I was alone. I said 'Mr Eric Cham Thiam Soon, what is this? You took my share without my knowledge.' He said, 'don't worry Mr William I am going to pay you back all your shares. Being Christians, you have to believe me, I will honour it'. Then I said, 'this is too bad. Right now I am in need of money as my son is going overseas'. Then I was ready to buy bank draft. He said, 'don't worry, the two F shares is only about RM9,000 and you give me a few days'. After quite sometime, he paid me back through my wife the two lots of shares including the penalty by Sarawak Securities Sdn Bhd. It was RM9,000 something. It was paid in cash to my wife. As regards the other shares, he said he would pay me but to give him time. I said 'Okay, I give you one month'. He said cannot but to give him three months. I said so long as he would honour it, it was okay G and I gave him until December.

This witness had also said he told the defendant he would get into trouble if he reported the matter to the police. Thereafter, he made phone calls to the defendant but they were unanswered. When the three months was up H the defendant did not pay and he could not contact the defendant. He finally got to meet the defendant's wife who told him that the defendant was working in Brunei. He then told her that he has to do something to get back his money. The wife then promised to pay and later telephoned him to meet her. At this meeting the wife paid RM1,500 in cash and a necklace and told him that that was all she had. He then realized that he was not going to get I anything more from the defendant. He was advised by his friends to go after the plaintiff. He did and wrote a letter by hand dated 23 December 1996, viz:–

Mr Benny Ng Wu Hong
Sarawak Securities Sdn Bhd
[Etc...]

Re: Scripts for A/C No 995813

I regret to inform you that my scripts under the custody of your office had been secretly withdrawn from your Script Department without my knowledge by your then dealer, Mr Eric Cham.

I only came to know about it when I sold my Tan Chong lately. Earlier I had contacted your manager Puan Rokayah and she gave me an answer which I find difficult to accept.

Therefore I am seeking your opinion for the whole matter before I resort to legal action.

I am anticipating for your favourable reply.

[Etc ... Signed William Wong Ting Ho)

He thereafter went to the office of Ng Seng Bee, the Chief Operating Officer of the plaintiff after the latter had called him to go to his office to confirm the shares listed in two documents called script withdrawal form were his. Certain shares were then purchased by the plaintiff to replace those taken by the defendant and cash of RM29,110 was paid to him for others, including the two Tan Chong lots which he had already received payment from the defendant. He said that the defendant in August or September 1997 came to ask him to give him back the money regarding the two lots but he refused and said that he would rather return the money to the plaintiff but he did not. The defendant then visited him in his house with two men to threaten him for the return of the money. He then called Ng Seng Bee as to what to do and Ng Seng Bee asked him not to worry. A week or two later the defendant again came with two men and at this meeting he paid RM5,000 made up in two cheques after getting the two men to agree to that sum, instead of RM9,000, to make up for his losses. The defendant's wife also came and obtained her RM1,500 and necklace back.

On 24 January 1997 the plaintiff sent by registered mail a copy of William Wong's letter to the defendant vide a letter dated 23 January and demanded an explanation. The plaintiff did not receive any reply. Evidence was also led that the defendant signed the forms that preceded the withdrawal of the scripts and had received the scripts.

The defendant denied signing those documents. He denied receiving the letter of the plaintiff enclosing the complaint of William Wong. He said he was only a trainee remisier until 3 January 1995 when he obtained a licence to be a remisier. He said that William Wong's account was formerly under the remisier Fauzi Kassim before the account was handed to him. His other evidence are in these words:

No, I never stole the shares of Mr William Wong listed in this Statement of Claim. Yes, Mr William Wong did request me to request these scripts on his behalf. I did discuss with him that I needed some money and I needed these scripts to be pledged. At first he was quite reluctant but I managed to convince him. He agreed that whatever he sold, I would pay him bit by bit. I did pay him bit-by-bit ie the actual cash amount. I have settled part of my debt to him.

> As the price of the shares fluctuated, whatever share he sold was based on the price he sold at the market price. I have paid him about RM30,000. Later when I found out he has made a complaint to Sarawak Securities Sdn Bhd I tried to negotiate with him asking him to give me sometime so that I could pay him back whatever he needed ie whatever his request. He agreed to it. Yes, I was surprised when Sarawak Securities Sdn. Bhd. proceeded with this case as I was thinking this was a personal matter between Mr William Wong and I. ... As Mr William Wong was not around at this time, I passed the cash to his wife and I requested for a receipt (exh D7). This is the only documentary evidence I have that I have paid him. The other instances were paid to him by cash direct to him. This particular one was through the wife and so I requested for a receipt ... As of today, I am indebted to Mr William Wong ie RM78,873.50 minus RMD29,110 ie RM49,773.40. This is what I owe Mr William Wong but not Sarawak Securities Sdn Bhd.

Of crucial importance is establishing whether the defendant was handed the scripts of 14 counters which included the said two lots of Tan Chong. In this regard, the defendant's counsel did not say much. He did not explain the defence as to how the defendant was able to raise a loan which he said William Wong had agreed to allow his shares to be used as security and which the defendant alleged he was repaying the plaintiff bit by bit if the defendant had not taken possession of the shares. Why should the defendant confess to still owing William Wong RM49,773.40 after having paid RM29,110 if he had not taken the scripts. Given the unchallenged procedure regarding the taking of the scripts, who else could have obtained the scripts if not the defendant and, consequently, who else would have signed the withdrawal forms if not him. There is no substance in the contention that there is a need to call a handwriting expert since the opinion evidence of an expert can never be better than the direct evidence of witnesses who had seen the defendant sign the withdrawal forms. The evidence is so overwhelming that the defendant took the shares and that he had for that purpose signed the forms that it cannot but be said that it had been established beyond a reasonable doubt. There is plenty of justification in the lower court's disbelief of the denial of the defendant in signing those forms. That the defendant had taken the scripts is established beyond a reasonable doubt.

When Awang Safari Bin Awang Mahdini testified for the plaintiff that he handed over the scripts to the defendant, learned counsel for the defendant, put to this witness that the defendant did not collect the scripts from him. When the defendant gave evidence he did not expressly deny taking those scripts. He said he never stole them but that William Wong asked him 'to request these scripts on his behalf'. That contradicts his case that was put to the said plaintiff's witness that he did collect those scripts at all. Such a witness cannot be worthy of credit. Therefore, the evidence justify the decision of the lower court's finding that William Wong was to be believed when he testified that he did not consent to the defendant taking his scripts though the defendant had asserted otherwise. There was no consent at all from William Wong which decision of the lower court cannot at all be faulted.

Conclusion

In the premises the appeal is dismissed with costs to the respondent/ plaintiff.

Appeal dismissed.

Reported by Jafisah Jaafar